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IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 397.

WILLIAM HOLLIS AND SAM GOODMAN,
Appellants,

vs.

CHARLES W. KUTZ, CHAIRMAN; LOUIS BROWNLOW AND W. GWYNN GARDINER, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND AS SUCH CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS LIGHT COMPANY,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR APPELLANTS.

APPELLANTS' RIGHTS NOT BARRED BY 120-DAY LIMITATION.

On pages 4 and 5 of the Gas Company's brief, it accepts the conclusion of the Supreme Court of Louisiana in *Crow* v. *Supervisors*, 141 La., 1017, cited in *Wight* v. *Police Jury*, 264 Fed. 705, 714, relied upon in appellants' brief, pages 39-43, saying:

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> The view of the Supreme Court of Louisiana in *Crow* v. *Supervisors*, 141 La., 1017, quoted at page 36 of the brief, we submit, states the unquestionable doctrine; namely, that, while the law-maker must recognize the right of the owners of property to raise all legal and constitutional objections to a measure which they may think proper, it may nevertheless be declared that "the right so recognized must be exercised in time and not throughout eternity."

While the Gas Company recognizes this as the unquestioned doctrine, the 5th Circuit Court of Appeals, as appears in the continuation of its opinion, page 42 of appellants' brief, says:

> We do not understand that the court (in 141 La., 1017) intends, by the use of this language (that above quoted and approved by the Gas Company) to suggest that constitutional provisions may be disregarded, and that after the lapse of the short period prescribed by the Act, the result is the same as if the limitations of the Constitution did not exist. The case called for no such comprehensive statement, and other holdings of the opinion negative such an intention.

The Fifth Circuit then quotes from another opinion of the Louisiana Court, wherein it said, pages 42 and 43 of appellants' brief:

> If this conclusion be correct, the police jury of the parish was absolutely without authority to order the election, and the situation is the same as if no election had been held, and prescription is not applicable.

Applying the same rule in the instant case, because of the invalidity of the orders as alleged in plaintiffs'

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bill, the result is the same as if no attempt had been made by the Commission to advance the rate from that fixed by law, and consequently the statute of limitations pleaded by appellees does not run.

Further quoting from the opinion of the 5th Circuit:

> The opinion in *Crow* v. *Supervisors*, further, however, says:
>
> "And the power of the state to limit the time within which rights, whether derived from constitutions or elsewhere, are to be asserted in her courts, is as well recognized as the rights themselves."
>
> If by this is meant that statutes which are unconstitutional may be enforced, if not attacked within the prescribed periods * * * the proposition made is not in accord with recognized principles.

The Gas Company also urges the doctrine of laches as precluding appellants from maintaining their bill.

Aside from the fact that the bill alleges facts showing the illegality of the orders and rates complained *of ab initio* we respectfully submit that the cases cited by the Gas Company are not in point. All those cases relate to transactions wherein the parties sought to have been barred were individuals actually a party to the transaction, and not as in the instant case, one of the general public.

If the orders and rates made the basis of the suit are illegal and void they are such as to all private consumers of gas in the District of Columbia, and as conceded by the Gas Company in its brief on page 5, wherein it says: "If the order was invalid, every consumer of gas in the District of Columbia would be entitled to the same ratio of refund and interest." And

it is submitted that, in fairness to all, such should be the case. If the private consumers of gas in the District have been forced to pay more than the legal rate the excess should be refunded, regardless of the amount and of the resulting depletion in the funds of the Gas Company.

As urged in our main brief, p. 38, citing *Norton* v. *Shelby Co.*, 118 U. S. 425, 442, an unconstitutional act is void for all purposes, and further, as decided by the Louisiana Supreme Court and the 5th Circuit Court of Appeals, the mere inaction of parties whose rights were sought to be affected by such an unconstitutional act, during a period of prescription, does not render such act legal and thereby preclude escape from its unjust enforcement.

That the Public Utilities Law did not contemplate the defeat of the rights of citizens in the District by such construction as that contended for by appellees, is emphasized in our main brief, wherein on page 38 we quote paragraph 93 of the Act and to which appellees refrain from referring.

Now, as bearing upon the equities of the matter, suggested in appellees' brief, we respectfully answer:

1st. The courts can not fail to take judicial cognizance of the fact that, in view of the great cost attached to such a proceeding as that here involved—in the Supreme Court of the District, in the Court of Appeals, in this Court, and in subsequent proceedings, before final judgment is reached and the rights of interested parties determined—it is a rare instance wherein a suit would be prosecuted at all by a private consumer, and if so within the time within which this was filed, to wit, as to the first order, within 14 months, and as

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to the second order, within 2 months. As to the cost of this suit which must be borne by the two plaintiffs, it is readily to be seen that in case of final judgment in their favor the amount of recovery will not begin to pay the costs of prosecution. Is it to be wondered at, if suit had not been filed at all? As a general rule the public is inclined to accept what they may know to be unconscionable and illegal burdens, rather than to resort to litigation, such as that in question, which, regardless of the outcome, is sure to result in financial loss as well as a great expenditure of time and energy. It has been thoroughly established that acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. "It has been shrewdly pointed out that power is frequently yielded to merely because it is claimed, and that it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question. Such circumstances can not be allowed to sanction a clear infraction of the constitution." *Pingree* v. *Auditor General*, 120 Mich. 95, 78 N. W. 1025; *State* v. *Wightson*, 56 N. J. L. 126, 28 Atl. 56; *State* v. *Beacon*, 66 O. St. 491, 64 N. E. 427; *Harrison* v. *Willis*, 7 Heisk (Tenn.) 35, 19 Am. Rep. 604.

2nd. The Gas Company can not complain of an adverse judgment in case the orders of the Utilities Commission attacked in plaintiffs' bill are held illegal. The action of the Commission in promulgating the orders complained of, was at the instance of the learned coun-

sel of the Company and in the way pointed out to said Commission by such counsel as the legal way. Should the Gas Company feel that an adverse judgment works a hardship to it, is it any more of a hardship than it was and is, on the private consumer to be deprived of his property without due process of law? It is remindful of the remark of Justice Moody in the case of *St. L. I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 296, in discussing the question of hardship to the carrier arising by reason of the absolute character of the Federal safety appliance law, in suits for damages resulting from injuries due to the absence of safety appliances from cars, required by statute, wherein it was said that the burdens should be thrown upon those "who could measurably control their causes instead of upon those who are in the main helpless in that regard."

APPELLEES' DENIAL OF FACTS ALLEGED IN BILL NOT A QUESTION INVOLVED.

At pages 5 and 6 of its brief the Gas Company takes exception to the allegation in the bill that the Gas Company furnishes gas to the United States, the District of Columbia and others, not private consumers, at a rate below the statutory rate of 70 cents. It is also true that appellants further alleged in their bill the additional facts that the same is furnished at far below the cost of producing gas at the burner, which, as claimed by counsel for the Gas Company at the hearing, was 79½ cents. *Whether or not these allegations are true is not a matter involved in this appeal. The question here is whether the facts alleged state a cause of action.* If gas is furnished to others than private consumers at a loss, and this loss is required

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to be made up by such private consumers of gas, also a reasonable profit on the gas so furnished at less than cost of production, we submit the same constitutes a taking of the property of the private consumer without due process of law. And notwithstanding the fact that the mains, service pipes, and distributing plants are in the streets, which are the property of the Governments, it is confiscation for the further reason that the part payment of these Governments' gas bills is entirely borne by the private consumers of gas in the District of Columbia and by them only, and not by the entire public.

THE FACT THAT THE GOVERNMENT OWNS THE STREETS, NO DOUBT, WAS A MATTER, AMONG OTHERS, CONSIDERED BY CONGRESS WHEN IT FIXED A FIVE-CENT LOWER RATE FOR GAS USED FOR LIGHTING PUBLIC BUILDINGS THAN FOR THAT FURNISHED TO PRIVATE CONSUMERS, AND WHEN IT PRESCRIBED A FLAT RATE PER LAMP PER ANNUM FOR GAS USED IN LIGHTING STREETS, PARKS, ETC.

As pointed out in appellees' brief, pages 6 and 7, Congress for years has been fixing the rates for gas furnished the General and District Governments, and also for that furnished the private consumers. Practically all, if not all, the time since 1882, the rates so fixed for gas used in lighting streets, alleys, parks, etc., have been taken care of in the annual appropriation bills for the district of Columbia at a maximum price of so much per lamp per annum. By an act of Congress of June 6, 1896 (29 Stat. L., p. 251), rates

for gas furnished to the Governments and to private consumers were established in a provision as follows:

> "That the Washington Gas Light Company of the District of Columbia is authorized to charge and collect, after the first day of July, eighteen hundred and ninety-six, for illuminating gas furnished to and paid for by private consumers in the District of Columbia, at the rate of not exceeding one dollar and ten cents per thousand cubic feet, until the first day of July, nineteen hundred and one, after which last-named date the rate shall not exceed one dollar per thousand cubic feet; and that after the first day of July, eighteen hundred and ninety-six, the Washington Gaslight Company of the District of Columbia shall furnish to the United States Government and the District of Columbia gas at the rate of one dollar per thousand cubic feet: Provided, That if consumers other than the Government shall not pay monthly any gas bill within ten days after the same shall have been presented, said company may charge and collect from said consumer so failing to pay said bill as aforesaid one dollar and twenty-five cents per thousand cubic feet for the gas furnished to said consumer during said month."

It is thus to be seen that from 1896 until 1901 the Government rate fixed by Congress was 10 cents less than that allowed to be charged the private consumer. After 1901, the rate to the latter was reduced to the rate prescribed for the Government, with the provision that unless consumers other than the Government should pay their bills within 10 days after the same shall have been presented there would be an additional charge of 25 cents per thousand cubic feet. The act of 1916, heretofore referred to, prescribed a five-cent lesser rate to the Government for gas used in lighting

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public buildings than that established as a maximum to be charged private consumers. This legislation is a clear recognition by Congress that the Government rate should be some less than that to be paid by others. Is it to be presumed that this differential was arrived at by Congress in a haphazard way? There can be but one conclusion, we submit, and that is, that because of all the circumstances, one of which was that the Government owns the streets in which the Gas Company's mains, service pipes, etc., are placed, the Government is entitled to a somewhat lower rate than that which others should pay. According to the Gas Company's contention, pages 7, 14 and 15, no allowance has been made for this concession by the Government, and now when the company asks for an increased rate because of advances in costs of producing and delivering its product at the burner, which by the orders complained of in this proceeding have been loaded entirely onto the private consumer, it attempts to justify no increase in the Government rate by saying that such action, or non-action, rather, is warranted because of the fact that the Government owns the streets. Counsel for the Company seem to have forgotten the statement of Mr. Minor, one of its attorneys, at the hearing before the Utilities Commission in formal case No. 13, when he said: "We are not likely to get this $1.10 rate (the rate sought when the 90-cent rate to the private consumer was prescribed) out of the Government, because they have not appropriation enough. *We think it is fair the Government should pay this with the private consumer.*" (See appellants' main brief, pages 26 and 27.) On pages 14 and 15 of the Gas Company's brief they present this question: "If the Company were required by Congress to remove its mains, service

pipes, street boxes, and other plant construction from their present situs in and under the streets and public spaces of the city and to locate them upon or under lands now in private ownership, to be acquired by contract or condemnation on payment of due compensation, could plaintiffs successfully maintain in the courts that the increased cost of gas to them which would result from the requirement was a taking of their property without due process or was otherwise in violation of their constitutional rights?" Under such circumstances there would result an increase in the cost of gas used both by the Government and private consumers, and if the entire cost were placed on the latter it would result in an unconstitutional burden being placed on them.

GENERAL GOVERNMENT NOT NECESSARY PARTY DEFENDANT TO BILL NOR EVEN A PROPER PARTY.

The Gas Company now says, but did not so contend in the trial court, that the United States should have been made a party, citing cases in no way analogous to the one at bar. We are content to answer this by saying that the United States is not an indispensable or necessary party any more than is any other consumer of gas in the District. This suit is based upon illegal action of the Utilities Commission and the consequent illegal rates for gas now being charged the private consumers. The fact that the District and General Governments are now securing gas far below cost of production at the expense of the private consumers does not constitute them indispensable or necessary parties in a suit where the private consumer is

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seeking to have set aside an unreasonable and discriminatory rate.

PLAINTIFFS' CLAIM AS TO INSUFFICIENCY OR FAILURE OF NOTICE RELATES ONLY TO THE SECOND ORDER.

The Gas Company urges that as to the first order "the bill does not claim any defect or insufficiency in the notice given, or that the plaintiffs did not receive it," etc. This is true, and that is not the ground of the illegality of that order claimed in the plaintiffs' bill. The claim of illegality as to want of notice relates only to the second order of the Commission.

PLAINTIFFS' DEMAND FOR TRANSCRIPT OF RECORD OF HEARINGS BEFORE THE COMMISSION.

The Gas Company's brief also refers to that portion of the bill which calls upon the Commissioners to furnish, for the use of the plaintiffs, a free transcript of the hearings, on the Company's applications for increased rates, as contemplated in paragraphs 53 of the Act. Whether under the statute the plaintiffs are entitled to this or not does not warrant a dismissal of the bill. There still can be no doubt but that a complete copy of the record in both hearings would under paragraph 52 of the Act have to be furnished to the trial court. When the purpose of the provision of the statute authorizing a free copy of the same "to any party to such investigation" is considered, and especially when it is noted that in the statute it is used in connection with proceedings to be had in the Supreme Court of the District, there can be little ques-

tion but that "any party to such investigation" contemplates any party making the appeal whether the same did or did not enter an appearance before the Utilities Commission. When that party by appeal to the Supreme Court of the District questions the legality of the action of the Commission he certainly to that extent becomes a party to the full investigation. But, be this as it may, the inclusion of this matter in the bill would be no more than surplusage and would not justify dismissal, as said before.

APPELLEES' OBJECTION TO BILL THAT SAME SHOULD HAVE BEEN FILED ON BEHALF OF ALL CONSUMERS IN THE DISTRICT, NOT SUSTAINABLE.

We submit that this objection is without merit.

In *Chas. Simmons Sons Co.* v. *Md. Tel. & Telegraph Co.*, 99 Md., 141, 57 Atl. 193, it was held that a bill by several parties to enjoin a telephone company from charging them higher rates than a city ordinance permits, is not objectionable although it alleges a contract by each of them with the company.

Also in *Ignatz* v. *City of Knoxville*, 1 Tenn. Ch. App., 1, a bill by several persons of the same class who have suffered injury by an attempt to enforce an illegal tax against them, seeking to prevent the collection of such illegal tax, is not demurrable for mutifariousness.

Appellants' bill is against the same defendants, arises from a common cause, involves similar facts, and presents causes of action governed by the same legal principles. See *Chicago Telephone Co.* v. *Ill. Mfrs. Assn.*, 106 Ill. App., 54, 56, 57. In that case it was said:

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"We are of the opinion that the fact that the complainants' claims are to a degree separate and distinct does not make the bill altogether multifarious, and that the common right of all the complainants, as above stated, enables them to join in one bill. *Chicago* v. *Collins*, 175 Ill., 445; *German Ins. Co.* v. *Van Cleave*, 191 Ill., 410."

See also *Madison* v. *Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S. W., 658.

FAILURE OF COMMISSION TO GIVE NOTICE OF HEARING TO PARTY ENTERING APPEARANCE ON BEHALF OF OTHERS RENDERS SECOND ORDER ILLEGAL.

Next, they discuss the alleged failure of notice as to the second order. We submit that the bill fully alleges a failure of notice to Mr. Walter as attorney or representative of certain citizens of Takoma Park, such as to render action by the Commission, as a result of such failure on its part to comply with the requirements of the Act in that regard, illegal and of no effect. It is of no importance whether the Mr. Walter is the one representing appellants or whether the parties he represented and on whose behalf he entered an appearance at the second hearing are the plaintiffs in the case at bar. The hearing in question extended to the matter of fixing a rate applicable to all private consumers of gas in the District. As such they were all entitled to be heard as provided in the Utilities Act. They were all entitled to reasonable notice—personal notice to all entering appearances and the same to representatives entering appearances on behalf of those not personally appearing. Since the

hearing is on a question affecting the entire District, certainly the entire community is entitled to be heard. If not, how much and what sections of the District should be heard to make the order legal? We submit that the mere statement of the question is an answer. Now, therefore, since a failure to give notice renders the action of the Commission illegal, it must follow that it is illegal regardless of who or how many persons failed to get the notice. Mr. Walter, as representative of certain parties in Takoma Park, was entitled to written notice of the time of the second hearing, to the same extent that others, including the Gas Company, were entitled to. The activity with which he sought to be sure of getting the notice, as alleged in the bill, most likely is surplusage, for the reason that the requirements of the Act place the duty of giving notice entirely on the Commission. The allegation of all the facts was for the purpose of bringing to the attention of the Court the failure of the Commission to fulfill its duties to the public in matters in which the public is trying to assist.

As to Mr. Walter's right to rely on statements of the secretary of the Commission as to the matter of notice, the argument of appellees certainly can not be sincere. We submit that under recognized rules of practice before an administrative body such as the Public Utilities Commission, he was legally entitled to seek information and to rely upon the same from the secretary of that body.

The cases cited in our original brief we think are conclusive on the effect of the failure of notice on the legality of the second order.

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AS TO APPELLEES' INSISTENCE THAT PLAINTIFFS SHOULD HAVE COMPLAINED TO UTILITIES COMMISSION BEFORE APPEALING TO THE COURT.

It is to be noted that no attempt is made by the appellees to reconcile the conclusion of the Court of Appeals on this proposition with the decisions cited in appellants' brief, pages 12-15. It is urged in the Gas Company's brief, pages 8-10, that by reason of appellants' not having appeared before the Commission when hearings were held on the two applications for increased rates resulting in the orders complained of, and by reason of their not submitting to the Commission the complaint they have otherwise instituted in the Supreme Court, they have thereby not complied with the requirements of the Utilities Act, and have undertaken, as the Company alleges, to "cast upon the Courts the burden of hearing the application for an increase in rates anew, upon objections made and upon evidence to be offered for the first time, before the Courts, and with the burden also upon the Public Utilities Commission at the expense of the public, of furnishing transcripts, comprising many hundreds of pages, of the evidence adduced before it, both by the utility and by its own experts and representatives, for use in the court proceedings."

Such is not the case. The relief sought by appellants is not such as could be granted by the Utilities Commission, but it is of a nature that could only be granted by a Court of Equity. The bill is based on the illegal action of the Commission in proceeding in disregard of the requirements of law; on the consequent illegality of the orders made the basis of complaint;

and on the inherent illegality of said orders because of their effecting a deprivation of property without due process of law. As pointed out in our main brief, p. 12, relief from such unauthorized action can be obtained only from a court of competent jurisdiction, and not from a purely administrative body such as the Public Utilities Commission. *Int. Comm. Comm.* v. *L. & N. R. R.*, 227 U. S., 89, 92, and cases cited.

THE LEGISLATIVE HISTORY OF SECTION 6 OF THE ACT OF 1916, THE PROVISIONS OF WHICH ARE QUOTED ON PAGES 23 AND 24 OF OUR MAIN BRIEF, CLEARLY DETERMINES THAT HAD NOT THE SECOND PARAGRAPH THEREOF, RETAINING ALL POWERS FORMERLY POSSESSED BY THE COMMISSION (AND WHICH AS ONCE URGED BY THE GAS COMPANY ITSELF EXTENDED TO THE FIXING OF A RATE TO THE GOVERNMENT) BEEN ENACTED, THE FIRST PARAGRAPH THEREOF FIXING A RATE TO THE GOVERNMENT WOULD NOT HAVE BEEN RESTORED.

The error under which appellees are laboring, as evidenced by their statements in their brief on pages 16 and 17 and which leads them to conclude that the history of the legislation resulting in Section 6 of the Act of 1916, determines that the Commission does not have the power and consequently is not required to promulgate rates to the General and District Governments, is clearly apparent. As heretofore made clear, Section 6 originally consisted only of the first paragraph of the present Section 6. This was voted down

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for the reasons shown in the history of the legislation. Then followed the amendment fixing the 75-cent rate to private consumers which specifically retains to the Commission all powers theretofore possessed by it and which, as we have shown, as once contended by counsel for the Gas Company, extends to the fixing of a rate to be charged the General and District Governments. In view of that proviso, the Senate then restored the original Section 6, which fixed a 70-cent rate for gas to be used in the public buildings of the United States and the District of Columbia, and thereupon adopted the section in its present form. There can be no doubt of the proposition that the first paragraph of that section would not have been enacted had it not been for the second paragraph which specifically provides "That nothing herein contained shall be construed as limiting or taking away any of the powers now vested by law in the Public Utilities Commission of the District of Columbia." Appellees urge that this proviso relates only to the second paragraph and does not go to the provisions of the first paragraph. If they are correct in this connection, in order to be consistent, they must also insist that it does not relate to the third paragraph, and, if so, the Commission has exceeded its authority with respect to the provisions of that paragraph relating to the maximum charge of 85 cents per thousand cubic feet permitted to be made by the Georgetown Gas Light Company for gas for cooking, illuminating and other purposes, for the reason that in both orders attacked by plaintiffs' bill the Commission granted the increased rates to 90 and 95 cents, and made them applicable to gas furnished by both The Washington Gas Light Company and the Georgetown Gas Light Company. It would, however, hardly seem reasonable that

Congress intended by the Act of 1916 to give the Commission power to increase the rates to be charged by one gas company in the district and not give the same power of regulation as to other companies furnishing gas to private consumers.

Appellees fearing the worst as a result of consideration of the entire history of the legislation set out in our brief, cite the case of *United States* vs. *Freight Ass'n*, 166 U. S., 290, 317-18, as sustaining the inadmissibility of such history. We submit, however, that the recent case of *United States* vs. *St. Paul M. & M. Ry. Co.*, 247 U. S., 310, removes any doubt as to the admissibility of the entire history of the Act, as quoted in the original brief. In that case the facts stated in connection with the history of the legislation involved are set out in the margin and are almost identically along the same lines as those we have quoted. In that case Mr. Justice Pitney said, page 318:

> "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States* vs. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 318. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. (Cases cited.) The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to the matters of common knowledge they may very properly be taken into consideration as

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throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the old law, the mischief and the remedy."

THE FACT THAT PRIOR AND SUBSEQUENT TO THE ENACTMENT OF THE PUBLIC UTILITIES ACT AND THE ACT OF 1916 CONGRESS FIXED RATES FOR GAS FURNISHED TO THE GOVERNMENTS, DOES NOT DETRACT FROM THE SOUNDNESS OF APPELLANTS' CONTENTION THAT THE COMMISSION HAS THE POWER TO FIX GOVERNMENT RATES.

On pages 6, 7, 19 and 20 of the Gas Company's brief it is urged that the action of Congress, year by year, in prescribing rates for lighting streets, parks, etc (22 Stat., 139, 466; 25 Stat., 320, 799; 26 Stat., 300, 1068; 27 Stat., 157, 542; 28 Stat., 252, 751; 29 Stat., 672; 30 Stat., 532, 1052; 31 Stat., 562, 831; 32 Stat., 601, 966; 33 Stat., 375, 896; 34 Stat. 496, 1183; 35 Stat., 287, 702; 36 Stat., 391, 1009; 37 Stat., 181, 952; 38 Stat., 531, 906; 39 Stat., 692, 1020; 40 Stat., 931; and 41 Stat., 80, 849); for lighting public buildings 70 cents per thousand cubic feet (38 Stat., 553, 926; 39 Stat., 272); and for gas furnished to Governments and private consumers (29 Stat., 251; 39 Stat., 272), is irreconcilable with the contention that the Utilities Commission possesses the power to change the Government rates. In all these acts of Congress it is to be noted that the rates fixed are maximum rates, with no restriction that the company could not charge lower rates. In fact, the Gas

Company in 1910 voluntarily reduced its rate to private consumers from the statutory rate of $1.00 fixed by the Act of June 6, 1896, to 90 cents, and in 1911 further reduced it to 85 cents. The last named rate was in effect at the time the Utility Act was enacted and remained in effect until the Act of 1916, when it was reduced by Congress to 75 cents. At the time the Utility Act was passed the Government rate as prescribed by Congress for gas other than that used for lighting streets was that fixed by the Act of June 6, 1896 (29 Stat., 251). At the same time the maximum rate for lighting streets, parks, etc., was fixed by the Appropriation Acts at $18.40 per annum for mantle gas lamps, and $10.00 per annum for street designation lamps, which rate since then and now is in effect, being reenacted each year.

This history of legislation is cited for the purpose of showing the situation at the time the Utilities Act was passed. In the light of this information the attention of the Court is called to certain paragraphs of the Act:

> "Par. 24. That every public utility shall file with the Commision, within a time to be fixed by the Commission, schedules, which shall be open to public inspection, showing *all rates, tolls, and charges which it has established and which are in force at the time for any service* performed by it within the District of Columbia, *or for any service in connection therewith or performed by any public utility controlled or owned by it.* The rates, tolls, and charges shown on such schedules shall not exceed the rates, tolls, and charges *now allowed by law,* and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall

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remain and be in force *until set aside by the Commission.*"

* * * *

"Par. 26. That a copy of so much of said schedules *as the Commission shall deem necessary for the use of the public* shall be printed in plain type and kept on file in every station and office of such public utility where payments are made by the consumers or users, open to the public, in such form and place as to be readily accessible to the public and so as to be conveniently inspected."

* * * *

"Par. 30. * * * The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges *until the same are changed as provided in this section.*"

* * * *

"Par. 88. That whenever, after hearing and investigation as provided in this section, the Commission shall find that *any rate, toll, charge, regulation, or practice of any public utility in the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in this section.*"

* * * *

"Par. 94. That, first, *unless the Commission shall otherwise order,* it shall be unlawful for any public utility within the District of Columbia to demand, collect, or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service under the law in force at the date of the passage of this section."

It is to be observed from a consideration of these paragraphs that the Act contemplates a filing of schedules of all rates established by the utility and prescribed by law, and that such schedules shall remain in

force until changed by an order of the Commission. It is also to be borne in mind that the Commission requires and has on file the Government rates as well as the rates to private consumers. If this were not so, in view of the fact that only maximum rates are prescribed by statute, the Commission would be at a loss to know the rates actually being charged by the various utilities. Such information is necessary in order that the Commission may be able to fix reasonable and non-discriminatory rates as provided in paragraph 88, above quoted. In order that the Commission shall not be hampered in any way in the exercise of its duties in fixing reasonable and non-discriminatory rates a special provision in paragraph 92 was enacted as follows:

> "That the provisions of this section shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this section the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this section conferred on said Commission. The Commission hereby created shall have, in addition to the powers in this section specified, mentioned and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform, and execute all the said powers herein specified, mentioned and indicated."

To hold that the power of the Commission does not extend to the regulation of the utilities in their dealings with the Government and its agencies with respect to rates, we submit would be in disregard of the last quoted provisions of paragraph 92, as well as the other

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all inclusive provisions of the entire Act. There runs throughout the entire statute the prominent feature that no user or receiver of any product or service of any utility is excepted from the requirements or applications of its provisions. We therefore submit that to give the Act any other construction than, that in the matter of fixing rates, the Utilities Commission has full power to consider and fix Government rates would be practically to render that Commission powerless to accomplish one of the main objects manifestly intended by the Act. And we submit further that the facts alleged in appellants' bill forcibly presents just such a situation.

AMENDMENT OF BILL BY INCLUDING ALLEGATION OF INADEQUATE REMEDY AT LAW, NOT OBJECTIONABLE.

While the amendment may not have been necessary, it could work no hardship, and was thought best out of an abundance of caution. It is always sufficient if the bill sets forth grounds for jurisdiction. *Seaboard Air Line* v. *Koennecke,* 239 U. S., 352. "The facts stated confer jurisdiction." *Story,* Eq. Pl., Sec. 34.

The Gas Company in its brief, page 13, faintly urges that the plaintiffs in their bill did not allege that the reason the Commission failed to increase the rate to the Government and the District was because of a ruling by that body that it had no power to do so. Whether or not this particular allegation was made, it is sufficient to say that the allegations in the bill, which include the findings and orders of the Commission, conclusively charge facts showing that the rates fixed by that body were made in disregard of the rates

at which gas was furnished to the General and District Governments, which as alleged in the bill and shown in the reports and findings of the Commission were far below the cost of production at the burner, and the Commission made the rates to the private consumer sufficiently high to make up for all losses, and, in addition, give to the Company a reasonable return on its investment.

THE WILCOX CASE.

Lastly, as to the Gas Company's criticism, page 13 of its brief, of appellants' statement of the *Wilcox case* as presented on pages 46, 47 and 48 of the latter's brief. Here again appellees have not fortified themselves. The rates attacked in the *Wilcox case* were not rates fixed by the Gas Commission, and consequently the following statement in appellees' brief, the authority for which is cited as pages 35 and 36 of the report of the case, is not correct, namely:

> "In *Wilcox* vs. *Consolidated Gas Co.*, 212 U. S., 54, the objection urged in opposition to the rate fixed by the Public Utilities Commission was, not as seems to be contended by the learned counsel for the plaintiffs, at pages 37-8 of their brief, whether a difference of five cents per 1,000 cubic feet between a municipality and private consumers was discriminatory; but, as shown at pages 35-6 of the report, that since the Commission was bound to allow a reasonable rate to be charged to the private consumer, and had determined 80 cents per 1,000 cubic feet to be that rate, its order that the Gas Company should furnish gas to the municipality at 75 cents per 1,000 cubic feet was a requirement that it should sell gas at less than a reasonable rate, and was for that reason confiscatory

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and a taking of property without due process of law."

This statement of the Gas Company is not borne out by the report in the *Wilcox case*. In the first place, pages 35-6 of the report, as above referred to by the Company, do not sustain them in their contention that since the New York Gas Commission was bound to allow a reasonable rate to private consumers, which it had fixed at 80 cents, the appellee gas company in that case argued that the order of the same Commission fixing a rate of 75 cents to the municipality was unreasonable and confiscatory. In the second place, the rates considered by the Court in that case were not rates fixed by the New York Commission but were rates fixed by the legislature.

Now, if counsel for the Washington Gas Light Co. will again examine the *Wilcox case* they will find, on pages 40 and 41 of the report, under the opinion of the Court the following:

> "An examination of the record herein, with reference to the questions involved in the merits, shows that the act under which the Gas Commission was appointed was subsequently to the commencement of this suit, declared, on grounds, not here material, to be unconstitutional by the Court of Appeals of New York. 191 N. Y., 123, February 18, 1908. The order made by the Commission must therefore be regarded as invalid. It is not important in this case, because the act of the legislature of 1906 makes the same provision as to the price of gas to consumers other than the city that the order does. We have as remaining to be considered the above mentioned two acts of the legislature."

The contention made by the Gas Company in the *Wilcox case* is stated by the Court on page 54 of the report, wherein the Court said:

> "Lastly, it is objected that there is an illegal discrimination between the city and the consumers individually."

Then follows the conclusion of the Court as set out in our original brief, p. 47.

Respectfully submitted,

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